
Supreme Court of the United States

No. 528.

ARTHUR J. BROWN, PETITIONER

— — — — —
UNITED STATES OF AMERICA,

BRIEF FOR PETITIONER.

I N D E X

PAGE

Opinions Below	1
Jurisdiction	1
Specifications of Errors	2
Statutes and Resolutions Involved	2
Statement	2
Summary of Argument	3
POINT I—The Court of Appeals for the District of Columbia committed reversible error in affirming the ruling and charge of the Trial Court concerning the competency of the House Committee at the time the petitioner was sworn and testified	3
POINT II—The Court of Appeals for the District of Columbia Circuit committed reversible error in affirming the conviction of petitioner for violation of the District of Columbia Criminal Code	10
POINT III—The petitioner was deprived of this right to a fair and impartial trial as guaranteed by the Fifth and Sixth Amendments of the United States Constitution by the denial of motions made by petitioner under Rules 17(b) and 15(a) of the Federal Rules of Criminal Procedure	11
POINT IV—The Court of Appeals for the District of Columbia Circuit committed reversible error in affirming the rulings of the Trial Court concerning the investigation of the jury panel by the Federal Bureau of Investigation	11
Conclusion	14

TABLE OF CASES CITED

	PAGE
Commonwealth v. Whittaker, 131 Mass. 224	6
Crawford v. United States, 212 U. S. 183	12, 13
Dalton v. United States, 154 F. 46	7
Field v. Clark, 143 U. S. 649	4
Fleischman v. United States, App. D. C., April 8, 1949, No. 9852	8, 9
Francone v. Southern Pac. Co., 145 F. 2d 732	12
Frazier v. United States, 93 L. Ed. 175	13
Heard v. State, 95 Tex. Crim. 530	7
People v. Scott, 22 Cal. App. 54	7
Sinclair v. United States, 279 U. S. 263	8
State v. Roswell, 153 Mo. App. 338	7
State v. Sanford, 44 N. M. 66	7
State v. Shelley, 166 Mo. 616	7
State v. Wiedenfeld, 229 Wis. 563	7
United States v. Ballin, 144 U. S. 1	4, 5
Walton v. State, 71 Ark. 398	6

OTHER AUTHORITIES CITED

2 U. S. C. § 192. (R. S. Section 102, as amended, 52 Stat. 942)	8
6 Cannon's Precedents of the House of Representa- tives, § 345; p. 491	6
Title 22, Section 2501, District of Columbia Code	3

IN THE
Supreme Court of the United States

OCTOBER TERM—1948

No. 523

HAROLD ROLAND CHRISTOFFEL,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinions of the District Court are unreported. The opinion of the Court of Appeals (R., 275-277) is reported at 171 F. 2d 1004.

Jurisdiction

The basis for this Court's jurisdiction is set forth in the petition for writ of certiorari herein, at page 9.

Specifications of Errors

The specifications of error are set out in the brief in support of the petition for writ of certiorari herein (pp. 17-19) and in the petition (pp. 11-12).

Statutes and Resolutions Involved

The statutes and resolutions involved are set forth in the petition herein at pages 9-11.

Statement

This brief is intended only as a supplement to the brief filed by the petitioner in support of his petition herein. A complete and detailed statement of the matter involved in this review is to be found in the petition herein at pages 2-8.

In its prior brief opposing the petition for a writ of certiorari, the *United States* left the impression that the "petitioner in effect admitted * * * that he had committed perjury" (*Brief for the United States in Opposition*, p. 6, n. 1).

The petitioner did stipulate below to omit from the Joint Appendix all portions of the typewritten trial transcript relating to the question of whether he gave false and perjurious testimony before a Congressional Committee. This stipulation was entered into to minimize the financial burden of the petitioner and in deference, as well, to the rule of the Court of Appeals for the District of Columbia Circuit proscribing the printing of unnecessary portions of the record and in further deference to the rules of law and experience that a jury verdict will not be reversed where there is some evidence in the record to support it.

Mainly because of the expenses involved in printing an additional brief.

However, the original transcript reveals that the petitioner, upon the trial, actively opposed the charge of perjury on the merits. Indeed, but for the ruling denying the petitioner the right to present the testimony of numerous witnesses, or, in the alternative, to take their depositions (See *Brief in Support of Petition*, pp. 49-52) the petitioner would have opposed the charge of perjury much more completely and, in his view, successfully. If, as a result of the instant review a new trial is granted, petitioner will again oppose the charge of perjury on the merits.

Summary of Argument

The Court is respectfully directed to the summary of argument which appears in the brief in support of petition for writ of certiorari at pages 19-21.

POINT I

The Court of Appeals for the District of Columbia committed reversible error in affirming the ruling and charge of the Trial Court concerning the competency of the House Committee* at the time the petitioner was sworn and testified.

At the trial and at all stages of this appeal, the argument of the *United States* has been the same. The Government has urged, and the Courts below have held, that the House Committee was a competent tribunal within the meaning of Title 22, Section 2501 of the District of Columbia Code (Perjury) because a quorum of the Committee convened at the appointed meeting hour. The rulings below have sus-

* The Committee on Education and Labor, House of Representatives, 80th Congress, First Session, hereinafter sometimes referred to as "House Committee."

tained the proposition that once a quorum of a Committee has convened, the Committee is a competent tribunal for all purposes irrespective of the number of Committee members actually present at any given moment, provided no point of quorum has been raised. In advocating this position the *United States* has confused competency for legislative purposes and competency within the meaning of the applicable perjury statute.

Before this Court, as heretofore, the *United States* has relied principally upon the thesis announced in *United States v. Ballin*, 144 U. S. 1, and *Field v. Clark*, 143 U. S. 649. Those cases did not involve a perjury nor did they involve the competency of a tribunal within the meaning of a perjury statute.

Two questions only are presented: First, was the Act of May 9, 1890, legally passed and, second, what is its meaning. The first is the important question." (*United States v. Ballin*, 144 U. S. 1).

These cases then were civil ones involving an effort to invalidate duly enrolled legislation. Under such circumstances, the Court, mindful of the reliance placed on legislation ostensibly properly passed, and mindful of the need to secure rights vested as a result thereof, refused to peer beyond the last in a sequence of official records. Sound considerations of public policy support such a doctrine. It would seem quite proper to enjoin the overthrow of legislation duly enacted in accordance with prescribed rules and to refuse to permit reference to evidence *dehors* the official records for this purpose. The rights of too many people would thus become involved in *ex post facto* determinations and prejudice and uncertainty would surely follow.

However, no such public policy operates in the instant or similar criminal cases. For while "the Constitution empowers each House to determine its rules of proceedings" this Court has held that the Congress "may not by its

rules ignore constitutional restraints or violate fundamental rights". *United States v. Ballin*, 144 U. S. 1. Moreover, "there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained". *United States v. Ballin*, *supra*.

In the instant case "the result which is sought to be attained" is not a challenge to legislation duly enacted. No effort is made to invalidate the Taft-Hartley law. All that is sought to be accomplished is to protect "a fundamental right" of the petitioner in connection with a criminal charge.

Public policy supports rather than defeats the position of the petitioner. Assuming that the official records here disclose that a quorum of the House Committee convened, and assuming further, that the official records are silent as to the attendance record of Congressmen at the time of the testimony in issue, there are compelling reasons to inquire into the true state of affairs upon which the official record is silent. If a Congressional Committee were to be regarded competent, despite the fact that only a small fraction of a quorum was present at the time of the alleged perjury, the right of a solitary Congressman, unchecked by colleagues, to harass, badger and, indeed, prosecute a witness, would be upheld. It may hardly be urged that such a result is to be encouraged by this Court.

Nor is it true, in the petitioner's view, that a Committee is required to suspend its hearing as soon as it appears that less than a majority are present. It is only true that no charge of perjury can be levelled against a witness who has allegedly testified falsely in the absence of a quorum of a Committee.

The Committee and its aides are well placed to assume the burden of maintaining a quorum where perjury seems prospective. The chairman and the duly appointed clerks of and attendants to the Committee can easily check to in-

sure the presence of a quorum in such cases.* This requirement can in no wise be regarded as an undue limitation on the activities of a Congressional Committee. Indeed the real limitation on such activity would be the absence of members of the Committee.

The competency of a Congressional Committee, insofar as perjury statutes require it, would seem to be clearly settled. Thus, it has been stated:

"In order to support a charge of perjury, it must be shown that a quorum of the Committee of investigation was present *at the time the offense was committed*." (6 Cannon's Precedents of the House of Representatives 345, p. 491). (Italics added.)

The "time the offense was committed" cannot be prior to the time that the oath is administered and violated by false testimony.

A contrary view would have to rest on some presumption. Such a presumption could be overcome either by proof or the presumption of innocence.

In criminal law the well-settled rule, where there is a conflict between the presumption of innocence and some other presumption is that the former prevails. Thus it has been held that the presumption of innocence prevails against the presumption of a woman's chastity (*Commonwealth v. Whitaker*, 131 Mass. 224; *Walton v. State*, 71

* Compare the situation of a Congressional Committee and that of a Grand Jury. It appears that a Grand Jury cannot function in the absence of sixteen Grand Jurors.

"No evidence can be taken unless at least sixteen are present. It is important that the Secretary keep a record at each session of the number of Grand Jurors in attendance and the number voting on a Bill, and preserve his records in case a question arises as to whether a prerequisite number to wit, sixteen were in attendance." "If only sixteen Grand Jurors are present and one leaves the room, taking of evidence must be suspended until his return. The Foreman may temporarily excuse a member, provided the number remaining in attendance shall be at least sixteen." *Handbook for Federal Grand Jurors, Southern District of New York*, issued by Federal Grand Jury Association for the Southern District of New York, Second Edition 1939, p. 7.

Ark. 398), against the normal presumption of ownership arising from possession (*State v. Russell*, 153 Mo. App. 338), against the presumption of delivery of an instrument arising from the fact of possession by the party to whom delivery must be made (*People v. Scott*, 22 Cal. App. 34), against the presumption that a check was made on the date and at the place stated therein (*State v. Wiedenfeld*, 229 Wis. 563), against the presumption that packages shipped from consignors to consignees contained articles which the latter expected to receive (*Heard v. State*, 95 Tex. Crim. 530), and against the presumption of continuance (*Dalton v. United States*, 154 F. 46).

In *State v. Shelley*, 166 Mo. 616, the presumption of innocence was measured against the presumption of official regularity. The defendant there was indicted for impersonating an elector. It was contended that since the name of the party impersonated appeared in the registration book as a voter and since the presumption is that registration proceedings, as official acts, were regular, the burden was on the accused to show that the party impersonated was not an elector. The Trial Court instructed the jury:

"That if they believed from the evidence that the name of (C, the party allegedly impersonated) appeared on the registration book * * * offered in evidence, then this in fact is prima facie evidence that (C) was an elector. * * *" (166 Mo. 616, 617).

The Court of Appeals of Missouri concluded otherwise:

"* * * such a presumption cannot either overlook or overcome the presumption of innocence which in every case is to be regarded by the jury as a matter of evidence to the benefit of which party is entitled. Greenleaf 14th Ed. Sec. 34" (166 Mo. 616, 618).

Similarly, in cases involving the presumption of continuance, it has been held that " * * * the presumption of the continuance of things is weaker than the presumption of innocence." (*State v. Sanford*, 44 N. M. 66, 78.9.)

Presumptions of regularity or continuance, in criminal cases, especially, cannot be substituted for proof. And in cases which arise from allegations of criminal misconduct before Congressional Committees the rule is clear. Thus when Harry F. Sinclair was convicted of a contempt of Congress and the Government argued that the pertinency of questions addressed to him was presumed, this Court went out of its way to disabuse the Government of the idea:

"Appellant earnestly maintains that the question was not shown to be pertinent to any inquiry the committee was authorized to make. The United States suggests that the presumption of regularity is sufficient without proof. But, without determining whether that presumption is applicable to such a matter, it is enough to say that the stronger presumption of innocence attended the accused at the trial. It was therefore incumbent upon the United States to plead and *show* that the question pertained to some matter under investigation" (*Sinclair v. United States*, 279 U. S. 263, 296-7). (Italics added.)

If, as is urged by the *United States*,* the presumption relied upon is conclusive, it is in conflict with the Constitution of the United States.

A recent decision makes it abundantly clear that a quorum of a Committee must be present not at some period prior to but at the time of the alleged perjury. Thus, in a case involving a violation of 2 U. S. C. § 192 (R. S. Section 102, as amended, 52 Stat. 942) the Court of Appeals for the District of Columbia Circuit has held that the question of "whether a quorum of the Committee was *present* when those persons made their statements of non-compliance, was a material issue of fact which should have been submitted to the jury for decision" (*Fleishman v. United States*, App. D.C., April 8, 1949, No. 9852). (Italics added.)

* See Brief for the United States, p.

Fleischman v. United States, supra, involved statements which allegedly constituted a contempt, but the decision therein squarely supports the rationale of the petitioner herein.

The United States has heretofore argued that no point of quorum having been raised at the hearing before the House Committee, no such point could be thereafter raised. *The Brief for the United States in Opposition*, at page 10 argues:

"The precedents of the House and Senate declare that when a quorum has been shown to be present and a session has legitimately begun to do business, the business accomplished before the lack of a quorum has been brought to the notice of the Chair cannot thereafter be challenged on that score."

The Government now concedes that the petitioner had no right to raise the issue of quorum at the hearing but persists in its argument that no person could raise the point after the Congressional hearing has been completed. The Congressional precedents do not confirm this view. Thus on May 17, 1918, the following dialogue took place in the House of Representatives:

"Mr. Carter of Oklahoma: I wanted to ask whether objection was made by anybody who attended."

"Mr. Houston: There was no objection made to the want of a quorum at any time; it was satisfactory to the Committee."

"Mr. Sanders: No point of no quorum was raised in the Committee."

"Mr. Saunders of Virginia: The point of no quorum was never raised in the Committee on Territories in this connection." 56 Cong. Rec. 6689.

Nevertheless, the Speaker ruled

"Now it may be true and I have no sort of doubt it is absolutely true * * * that this process of one com-

ing in and another dropping out goes on in these Committees. *That is alright as nobody raises the point, but when the point is raised you have to consider it according to the rule * * * when the point is raised you have got to have a quorum acting as a quorum.*" 56 Cong. Rec. 6689. (Italics added.)

Inasmuch as the petitioner, a stranger in the Congress, was powerless to raise the point of no quorum and since, as clearly appears, the point may be raised after the conclusion of the hearing, it follows that petitioner's challenge of the activity on the trial herein was timely and proper.

For the reasons set forth in the petitioner's brief in support of his petition for a writ of certiorari, as well as for the additional reasons herein set forth, it is respectfully submitted that the Court of Appeals for the District of Columbia Circuit committed reversible error.

POINT II

The Court of Appeals for the District of Columbia Circuit committed reversible error in affirming the conviction of petitioner for violation of the District of Columbia Criminal Code.

The Court is respectfully referred to the discussion in the brief in support of the petition for writ of certiorari herein at pages 43-49.

POINT III

The petitioner was deprived of his right to a fair and impartial trial as guaranteed by the Fifth and Sixth Amendments of the United States Constitution by the denial of motions made by petitioner under Rules 17(b) and 15(a) of the Federal^e Rules of Criminal Procedure.

The Court is respectfully referred to the discussion on this Point in the brief in support of the petition for writ of certiorari herein at pages 49-52.

POINT IV

The Court of Appeals for the District of Columbia Circuit committed reversible error in affirming the rulings of the Trial Court concerning the investigation of the jury panel by the Federal Bureau of investigation.

It has heretofore been indicated that counsel for the petitioner, at the trial, observed that the counsel for the *United States* had in his possession a set of papers containing the results of an investigation of the jury panel by the Federal Bureau of Investigation (*Brief in Support of Petition for Writ of Certiorari*, p. 53). A motion to disqualify the jury panel was denied (R., 29.30) despite the fact that the jury was to pass upon delicate questions of political ideology, and despite the fact that (as the original transcript shows) the jury panel and the jury, as empanelled, included Government employees subject to Executive Order No. 9835.

It has heretofore been urged that such a panel could hardly produce an impartial jury in a case of this character. The jury herein was aware throughout that it was called upon to decide a conflict between a Congressional Committee (some members of which actually testified) and the petitioner. In other words, here was a conflict wherein the prestige, if not the credibility, of representatives of the Government was juxtaposed to that of the petitioner. Here, if ever, is the classic example of jurors in the employ of the Government being confronted with the necessity of deciding between the Government and a citizen. Inasmuch as Communism (and all it connotes *vis a vis* the Government of the United States) was the issue, it is apparent that Government employees, subject to loyalty inquisitions, were left to decide a significant question involving a clash of opposite political ideologies.

The Government employee jurors were thus not only passing judgment in a case where their employer was a party—a circumstance which would disqualify a juror for cause at common law (*Crawford v. United States*, 212 U. S. 183; *Francone v. Southern Pac. Co.*, 145 F. 2d 732, 733)—but they were left to determine innocence or guilt within the context of a situation wherein the Government employee juror must necessarily pay heed to the risk that his decision would affect his loyalty status.

Of late years, the Government is using its power as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. A government employee cannot today be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, somewhat, if only a little, at stake in every such prosecution. And prosecutors seldom fail to stress, if not to exaggerate, the importance of the case before them to the whole

social, if not the cosmic order. Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind. I do not doubt that the government employees as a class possess a normal independence and fortitude. But we have grounds to assume also that the normal proportion of them are subject to that very human weakness, especially displayed in Washington, which leads men to " * * * crook the pregnant hinges of the knee where thrift may follow fawning." Jackson J., dissenting in *Frazier v. United States*, 93 L. Ed. 175 184, 185.

The fact that there were Government employees in the jury panel herein, coupled with the undenied charge that there was an FBI investigation of the panel, is sufficient to have required its disqualification. As this Court has stated: "

"It need not be assumed that any cessation of that employment would actually follow a verdict against the government. It is enough that it might possibly be the case; and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, *even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict.* It was error to overrule the defendant's challenge to the juror." (*Crawford v. United States*, 212 U. S. 183, 197. (Italics supplied.)

The fair and impartial jury that the Constitution requires is incompatible with the inclusion of Government employees on a jury panel from which jurors are to be selected for a trial involving the issues presented herein.

The failure to disqualify the jury panel below resulted in a trial of the petitioner by a jury which could not have measured up to the constitutional requirement.

CONCLUSION

For all of the reasons urged in the brief in support of the petition for a writ of certiorari and for all the reasons urged herein, the conviction and judgment should be reversed and remanded for a new trial.

Respectfully submitted,

O. JOHN ROGGE,

Attorney for Petitioner.

HERBERT J. FABRICANT,

MURRAY A. GORDON,

ROBERT H. GOLDMAN,

Of Counsel.